

9-25-06

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE	:	CASE NO. 03-82293-MGD
	:	
DANIEL DAVID DELPIANO,	:	CHAPTER 7
	:	
DEBTOR.	:	JUDGE DIEHL

**ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION AND
REIMPOSITION OF STAY**

On August 18, 2006, Daniel David DelPiano ("Debtor") filed a Motion for Preliminary Injunction and Reimposition of Stay ("Motion") in the above-referenced Chapter 7 case.¹ (Docket No. 180). The Court has reviewed the record in the case, and for the reasons set forth herein **DENIES** Debtor's Motion.

FACTS

Debtor filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code (the "Bankruptcy Code") on November 14, 2003. (Docket No. 1). After Debtor filed that case, seven unsecured creditors objected to Debtor's discharge or to the dischargeability of certain debts (or sought extensions to do so) pursuant to 11 U.S.C. §§ 523 and 727 based on Debtor's alleged fraudulent transfers and other activities. On July 19, 2004, McDill Columbus Corporation ("McDill"), one of these creditors, filed a Complaint alleging that its claim of \$1,750,000 (evidenced by a judgment) was nondischargeable. (Adversary Proceeding 04-06425, Docket No. 1). McDill alleged that its claim arose from money

¹Debtor filed the motion *pro se*, although the docket reflects he is represented in this case by counsel. Debtor is currently incarcerated at the Federal Correctional Institution in Jesup, Georgia.

obtained by Debtor by false pretenses, false representations, actions taken in bad faith with specific intent to defraud, and actual fraud. In addition, McDill alleged that its claim arose from Debtor's fraud and defalcation while Debtor had fiduciary duties to McDill. McDill asserted that these debts were nondischargeable pursuant to sections 523(a)(2)(A) and 523(a)(4).

Debtor timely filed an Answer on August 18, 2004, claiming that the subject judgment was not determinative of whether Debtor had engaged in "false pretenses, false representations, or actual fraud," that Debtor was not acting in a "fiduciary capacity" sufficient to authorize a finding that he engaged in "fraud and defalcation," and that Debtor did not engage in any "actual fraud." (Docket No. 7).

On September 14, 2004, Debtor filed a Motion to Dismiss his Chapter 7 Case. (03-82293, Docket No. 103). Debtor claimed that due to cost, expenses, and the possibility that he would not be able to obtain a discharge of his major debts, he was prepared to defend himself in any state court actions in which his creditors sought to collect their claims. On November 10, 2004, the Court denied Debtor's motion so as to prevent further prejudice to Debtor's creditors; Debtor had already had the benefit of the automatic stay for approximately one year since he first filed his case, forestalling all collection efforts. (Docket No. 118). Under section 362(a), the automatic stay provided Debtor relief from his creditors' collection efforts from the moment that he filed his petition. Voluntary dismissal would not have prevented Debtor from filing a new bankruptcy case thereby further frustrating his creditors' collection efforts.

On November 16, 2004, William J. Layng, Jr., Chapter 7 Trustee for the Estate, filed a Complaint alleging that Debtor's discharge should be denied under sections 727(a)(2), 727(a)(3), 727(a)(4), and 727(a)(5) based upon Debtor's failure to maintain adequate books and records, disclose his ownership and other interests in certain corporations, disclose his ownership interest in real estate, satisfactorily explain the loss of his assets, and his effort to confuse and mislead his creditors. (Adversary Proceeding 04-06623, Docket No. 1). On February 8, 2005, Debtor filed a Motion for Entry of Order Waiving Discharge, agreeing to waive his right to a general bankruptcy discharge under section 727. (Docket No. 10). On March 31, 2005, the Court granted the motion, thereby determining that Debtor had waived discharge under section 727 and that Debtor would not receive a discharge of his debts. (Docket No. 14).

The same day that Debtor asked the Court to waive his discharge in that adversary proceeding, Debtor also filed a Motion to Waive Discharge and Dismiss Chapter 7 Case in the lead bankruptcy case. (03-82293, Docket No. 123). Debtor argued that because he agreed to waive his discharge, he had eliminated his ability to seek relief under the provisions of the Bankruptcy Code and his case should be dismissed under sections 349 and 524. McDill objected to the dismissal of Debtor's case. (Docket No. 130). As McDill explained to the Court in its objection, Debtor had selected the Bankruptcy Court as the forum in which to address his obligations to his creditors. His creditors spent time and money to protect their interests in compliance with the Bankruptcy Code. Dismissing the case would not prevent Debtor from filing another bankruptcy action when McDill or another creditor was about to initiate collection actions. If Debtor were to file another bankruptcy petition, McDill and other

creditors would once again be forced to spend time and money to protect their interests and argue the issue of the nondischargeability of the debts. On April 24, 2006, the Court denied Debtor's Motion to Dismiss. (Docket No. 165).

On December 29, 2005, the Court determined, *sua sponte*, that Adversary Proceeding No. 04-06425, brought by McDill to determine the nondischargeability of the debt, had been rendered moot by Debtor's agreement to waive his right to discharge. (Docket No. 18). The Court dismissed that Adversary Proceeding for mootness without ruling on the issue of nondischargeability.

On May 1, 2006, the Trustee filed a Motion for Termination of the Automatic Stay in the lead bankruptcy case. (03-82293, Docket No. 167). On June 19, 2006, having received no objections to the Motion in writing or at the hearing, the Court terminated the automatic stay as to all creditors as to all property of Debtor, including property of the estate, so that creditors could pursue state court actions or other remedies against Debtor. On August 18, 2006, Debtor filed this Motion for Preliminary Injunction and Reimposition of Stay. (Docket No. 180).

ANALYSIS

Debtor asserts that he did not have notice of the Trustee's Motion for Termination of the Automatic Stay. Debtor states that he does not reside at either of the two locations listed for him on the Distribution List of the parties in interest, so he did not receive notification of the progress and changes in his case. Debtor's counsel was served with the Motion and Debtor does not dispute this fact. Debtor contends that reimposing the automatic stay would afford

him the opportunity to communicate with counsel or to obtain a new counsel. However, the local bankruptcy rules in this jurisdiction explicitly require Debtor to file a request to change his address to receive such notices regarding this case. Under BLR 9007-3(b),

Any party in interest which desires that its address for notices be changed from the address shown on any proof of claim, request for notice, or other paper previously filed by such party *must* file such request with the Bankruptcy Clerk and serve a copy of same on the debtor's attorney, the United States Trustee, and the trustee. Changes of address must be filed in each adversary proceeding, and filing in the main case alone is not sufficient. *A party shall not be entitled to notice at the new address in the absence of complete compliance with this Rule.*

(Emphasis added). Debtor is therefore not entitled to relief simply because he did not personally receive notice of the progress and changes in his case.

Regardless of Debtor's lack of actual knowledge of the Trustee's Motion and his claim of his subsequent inability to object in writing or at the hearing, Debtor cannot avail himself of the benefits of the automatic stay because the clear language of the Bankruptcy Code prohibits such relief and reinstating the automatic stay would be antithetical to the purposes of federal bankruptcy law.

The clear language of the Bankruptcy Code mandates that Debtor is not entitled to have the Court reimpose the automatic stay. Under section 362(c)(2), the automatic stay of actions against the debtor "continues until the earliest of - (A) the time the case is closed; (B) the time the case is dismissed; or (C) if the case is a case under chapter 7 of this title . . . the time a discharge is granted or denied." On March 31, 2005, the Court granted Debtor's motion to waive his discharge, which had the effect of denying Debtor's discharge. Therefore, under

section 362(c)(2)(c), the automatic stay terminated as to Debtor when his discharge was denied.

In addition to the clear language of the Bankruptcy Code, there is no equitable reason to reimpose the automatic stay. Debtor agreed to waive his discharge and conceded that he was prepared to defend himself in any state court action against his creditors' claims. Debtor cannot now avail himself of the protection of the automatic stay against his creditors' collection efforts.

It is well-settled that federal bankruptcy law serves two purposes: it provides a debtor an opportunity for a fresh start unencumbered by debt and allows creditors to share equally in the assets of the estate. *Burlingham v. Crouse*, 228 U.S. 459, 473 (1913) ("It is the twofold purpose of the [Bankruptcy Code] to convert the estate of the bankrupt into cash and distribute among creditors and then to give the bankrupt a fresh start."). See also 1 Alan N. Resnik & Henry J. Sommer, *Collier on Bankruptcy* ¶ 1.03[2][a] (15th ed. rev. 2006). A debtor is able to start afresh with the assistance of such mechanisms as the automatic stay, exemptions, and discharge at the conclusion of the bankruptcy proceedings. Bankruptcy law serves to protect creditors and to allow them to share equally in the assets of a debtor's estate. The moment that a debtor files the bankruptcy petition, debtor's property (less any applicable exemptions) becomes part of the estate for distribution to creditors. In addition, creditors can take actions under the Bankruptcy Code to ensure that they receive a fair share of their claim from the estate.

Where these two overarching principles of federal bankruptcy law conflict, courts must strike the appropriate balance between the rights of debtor and the rights of the creditors. On

one hand, a debtor is entitled to a reprieve from creditors' collection efforts during the bankruptcy proceedings through the automatic stay and to a fresh start through the discharge of his debts. At the same time, however, creditors are entitled under certain circumstances to have the automatic stay lifted and to prevent all or part of the debtor's discharge.

Debtor here sought the benefit of a fresh start by filing for relief under Chapter 7. As part of this fresh start, upon filing his voluntary bankruptcy petition Debtor immediately received the protection of the automatic stay under section 362(a). Thus, the bankruptcy petition and automatic stay forced Debtor's creditors to halt their collection efforts. Debtor enjoyed relief from such collection efforts for almost seventeen months. The Court denied Debtor's request to voluntarily dismiss his case because doing so would confuse creditors and allow this delay in the creditors' collection efforts to be prejudicial to creditors. In addition, nothing would prevent Debtor from filing a new case in the future, again frustrating his creditors' collection efforts. Granting Debtor's motion to reimpose the automatic stay would be similarly detrimental to creditors because the automatic stay would again give him the benefit of the automatic stay and reprieve from creditors' collection efforts under section 362(a) even though no discharge of those debts had been obtained.

Additionally, Debtor sought a fresh start in filing his bankruptcy petition to obtain a discharge of his debts. After Debtor agreed to waive his discharge under section 727, the Court dismissed McDill's Complaint to determine the nondischargeability of its claims because the issue had been rendered moot by Debtor's own agreement to waive his discharge of all debts. If the automatic stay was reinstated after Debtor agreed to waive the discharge of his debts, McDill and other creditors would once again be unable to pursue their collection

efforts. Creditors such as McDill are entitled to be free from the continued impositions and liftings of the automatic stay. Debtor cannot at the same time agree to waive his discharge to allow creditors to pursue collection of their claims and expect to reap the benefits of the protection of the automatic stay.

Accordingly, Debtor's Motion is **DENIED**.

The clerk shall serve a copy of this Order upon Debtor at the address on the attached distribution list. The clerk shall also serve a copy of this order on counsel for Debtor, Chapter 7 Trustee, United States Trustee and all creditors and parties in interest in the case.

SO ORDERED, this the 22nd day of September, 2006.



MARY GRACE DIEHL

UNITED STATES BANKRUPTCY JUDGE

Distribution List

Daniel David DelPiano
Federal Correctional Institution
2680 Highway 301 South
Jesup, GA 31599